

No. 11,286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

Appellee's Petition for Modification of Opinion and Judgment to Include Appellee's Attorney's Fees Upon Appeal.

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JUN - 7 1947

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Appellee's Petition for Modification of Opinion and Judgment to Include Appellee's Attorney's Fees Upon Appeal.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes appellee Harold Lloyd Corporation and respectfully petitions the Court to modify its opinion and judgment rendered May 12, 1947, so as to include an allowance of counsel fees to appellee as part of appellee's costs upon appeal, and as grounds therefor and in support thereof your petitioner alleges the following:

The Only Point Left Undetermined by the Opinion of the Circuit Court Is Appellee's Application for Counsel Fees Upon Appeal.

Application was duly and timely made by your petitioner in its brief filed October 30, 1946, that appellee's counsel fees should be "awarded to plaintiff's attorney as part of

plaintiff's costs on appeal." (Brief for Appellee Harold Lloyd Corporation, p. 109.)

Both appellants contended "There should be no award to plaintiff of attorneys' fees." (Appellant Universal's Opening Brief, p. 78; and Appellant Bruckman's Opening Brief, p. 73.) As we read appellants' briefs, however, there was no contention by either appellant that in the event the judgment should be *affirmed* plaintiff-appellee would not be entitled to an award of attorneys' fees as part of its costs.

The Opinion of this Court rendered May 12, 1947, is silent, however, as to an allowance of appellee's counsel fees upon appeal. The authorities hereinafter cited support such allowance.

As "The Prevailing Party" Appellee Is Entitled to Its Counsel Fees Upon Appeal in Addition to Its Costs and Attorneys' Fees in the Trial Court.

Section 40 of the Copyright Act of 1909, as amended, expressly provides that in actions for copyright infringement "the court may award to the prevailing party a reasonable attorney's fee as part of the costs" (March 4, 1909, c. 320, Sec. 40, 1935 Stats. 1084, 17 U. S. C. A. 166).

The judgment of the trial court (affirmed in this Court) expressly provided that plaintiff Harold Lloyd Corporation recover \$10,000 "as part of its costs" "as and for plaintiff's attorneys' fees incurred in the preparation, prosecution and trial of this action." [Clk. Tr. p. 43.] This allowance of counsel fees in the trial court was expressly restricted, however, to services rendered by plaintiff's counsel in the preparation and trial of the lawsuit and for *services rendered prior to the judgment* dated

January 8, 1946. [See Finding of Fact "XIV," Clk. Tr. p. 37; and Conclusion of Law "V," Clk. Tr. p. 39.]

Since February 6, 1946, appellee's counsel has labored diligently in the preparation of its defense to the appeals taken by appellants Universal Picture Company, Inc., and Clyde Bruckman.

Appellant Universal's Opening Brief and 25-page Appendix consisted of 25 main and subsidiary points and cited 122 cases. Appellant Bruckman's Opening Brief and Appendix consisted of 27 main and subsidiary points and cited or quoted from 36 cases and 8 textbooks.

The preparation of Appellee's Brief required a comprehensive and exhaustive study of all decided copyright cases in this country and in England, as well as analysis of all British and American copyright statutes. Although Appellee's Brief as finally filed in this Court consists of only 6 main points and 15 subsidiary points with quotations from or citations of 120 leading cases and 12 textbooks, many additional hundreds of authorities were consulted, digested and analyzed before our brief was reduced to the form and content in which it was finally filed.

Appellee's attorney, Harold A. Fendler, and two additional attorneys employed by appellee's counsel whose names do not appear on the brief, expended virtually their full time for a period of nearly three months (actually requiring more than 770 hours) in the preparation of Appellee's Brief herein. For these services, appellee submits a reasonable counsel fee to be awarded as part of its costs upon appeal is the sum of \$7,500.00.

As stated by Ball, "*The Law of Copyright and Literary Property*," at page 642:

"In copyright cases, a large part of the expense of litigation is thrown on the unsuccessful party."

In *Nichols v. Universal Pictures Corporation*, 45 F. (2d) 119, the Second Circuit Court of Appeals expressly held that the prevailing party was entitled to a reasonable attorneys' fee.

In *Sheldon v. Metro-Goldwyn Pictures Corp. et al.*, 106 F. (2d) 45, the Second Circuit Court of Appeals allowed \$5,000.00 to plaintiff's counsel for their services upon the first appeal wherein plaintiff was "the prevailing party." This sum was *in addition* to an allowance of \$10,000.00 for plaintiff's counsel fees in connection with the trial.

This Court will take judicial notice of the fact that the dollar value is at least 50% less at the present time than when the *Sheldon* case was decided. (See *O'Meara v. Haiden*, 204 Cal. 354, 367.)

See, also:

Lewys v. O'Neil, 49 F. (2d) 603 (where an aggregate allowance of \$17,500 counsel fees was made for services solely in the trial court);

General Drafting Co. v. Andrews (2 C. C. A.), 37 F. (2d) 54 (where \$2,000 damages was held adequate but \$4,000 counsel fees was allowed for work of plaintiff's counsel in preparing the case for trial and on appeal);

Cory v. Physical Culture Hotel, 14 Fed. Supp. 986, affirmed 88 F. (2d) 411 (where \$2,500 attorneys' fees were allowed in the trial court although total damages aggregated only \$5,000);

Warren v. White and Wyckoff Mfg. Co., 39 F. (2d) 922, 923 (\$1,000 attorneys' fees allowed in the trial court although damages aggregated only \$1,000).

In "The Copyright Law" by Herbert A. Howell, formerly Assistant Register of Copyrights, the following factors are set forth at page 154 as a guide to the Court in fixing the amount of attorneys' fees:

" . . . In making the award the Court gives consideration to the importance of the questions involved, the amount of pecuniary damages, the value of the professional services rendered and the success achieved."

Additional factors to be considered by the Court according to "Amdur—Copyright Law and Practice" (p. 1165) are the "character of the infringement and surrounding circumstances" and the "vigor of the defense."

This Court has unqualifiedly affirmed the judgment of the trial court in its findings of knowing, wilful and *deliberate infringement*. This Court has furthermore rejected each and every fallacious argument so vigorously pressed and re-emphasized by both appellants Universal and Bruckman. The questions involved in the decision were complex and important. The amount of pecuniary damage was large (\$40,000.00). The value of the professional services at only \$10.00 per hour would exceed \$7,500.00.

In view of the deliberate character of the infringement; the distorted and misleading nature of the briefs filed by the defendants on appeal; the exhaustive work required of appellee's counsel; and the final success achieved by appellee, we submit \$7,500.00 is a most reasonable counsel fee to be allowed appellee under all the circumstances of the case.

Conclusion.

Since defendants' infringements were deliberate; since their appeals from the very moderate judgment of the trial court were without merit; since appellee's counsel was required to expend 770 hours in preparation of appellee's brief upon appeal; and since appellee is the prevailing party, appellee should be awarded and allowed as part of its costs upon appeal a counsel fee of \$7,500.00, and the opinion and judgment of this Court rendered May 12, 1947, should be modified accordingly.

Respectfully submitted,

HAROLD A. FENDLER,

Attorney for Petitioner and Appellee Harold Lloyd Corporation.